

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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DEC - 9 1997  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Communications Assistance for ) CC Docket No. 97-213  
Law Enforcement Act )

COMMENTS OF THE  
NATIONAL TELEPHONE COOPERATIVE ASSOCIATION

NTCA is a national association of approximately 500 local exchange carriers ("LECs"). These small LECs provide wireline and wireline services throughout rural America. NTCA's principal interest is that implementation of the Communications Assistance for Law Enforcement Act (CALEA) will be effected in a manner that does not impose undue burdens on its members. NTCA previously filed comments with the Telecommunication Industry Liaison Unit of the Federal Bureau of Investigation to make this point in connection with implementation of Section 109 of CALEA. In those comments NTCA urged the adoption of procedures that simplify compliance with capacity and capability requirements and ensure recovery of the costs associated with compliance. Its comments here echo that concern.

INTRODUCTION

CALEA gives the Commission the responsibility to establish rules for telecommunications personnel that include procedures for administering interceptions in a manner that protects privacy and ensures that only lawful interceptions are assisted. The Commission also has the authority to define "telecommunications carrier" for purposes of CALEA and to review carrier petitions requesting the Commission's determination that

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compliance with CALEA's capability requirements is not reasonably achievable. This NPRM addresses the exercise of this authority.

I. THE COMMISSION SHOULD NOT EXPAND THE DEFINITION OF TELECOMMUNICATIONS CARRIERS BEYOND THE CONGRESSIONAL INTENT.

The Commission seeks comment on the applicability of CALEA's requirements to information services provided by common carriers. It notes that information services include current services such as electronic mail and on-line services but may also include advanced software services in development. NTCA urges the Commission to apply the principle of regulatory parity in deciding whether CALEA applies in this instance. Parity requires that common carriers that provide information services such as electronic mail should not be treated differently from other providers of these services.

The statute also clearly excludes common carriers as well as any other provider of information services, not just exclusive providers of information services. Section 1001(8) (c) of CALEA provides that the term "telecommunications carrier" does not include "persons or entities insofar as they are engaged in providing information services. . . ." It contains no qualifiers that would permit the inclusion of common carriers in the term "telecommunication carrier" for the purpose of imposing capability requirements on these common carriers in connection with their provision of information services. The Commission should follow the intent of Congress as evidenced in the plain meaning of the words in the statute. Any deviation from a strict interpretation of this exclusion would implicate additional privacy issues that affect the rights of LEC and CMRS subscribers, expand carrier obligations and involve costs that were not contemplated when Congress passed the Act.

**II      THERE IS NO JUSTIFICATION FOR REQUIRING CARRIERS TO REPORT  
ILLEGAL WIRETAPS AND COMPROMISES OF THE CONFIDENTIALITY OF  
INTERCEPTIONS TO THE FCC.**

The Commission asks whether a carrier's liability under 18 U.S.C. §§ 2511 and 2520 would be modified or mitigated if it is required to report illegal wiretaps and compromises of confidentiality to the Commission and/or law enforcement agencies. 18 U.S.C. §§ 2511 and 2520 impose criminal penalties and civil remedies, respectively, against persons who are convicted of conducting illegal electronic interceptions. NTCA opposes the adoption of a rule mandating this type of reporting. As the Commission acknowledges, criminal liability is premised on intent, the non-existence of which is not established by a record or report detailing the occurrence of an allegedly "unlawful" interception. Assuming vicarious liability for the intentional acts of employees, a report to the FCC or anyone else would be no more than additional evidence which may or may not mitigate or modify a carrier's liability. Reporting would only add another layer to the already grave obligation that carriers face. Unless the Commission or law enforcement is authorized to establish presumptions that the Courts will respect, the reports could just as well be used to increase carriers' risks of incurring penalties and damages under 18 U.S.C. §§ 2511 and 2520.

**III.    NTCA SUPPORTS THE COMMISSION'S PROPOSAL TO SIMPLIFY THE  
COMPLIANCE REQUIREMENTS OF SECTION 229.**

Section 229 provides the authority for the Commission to adopt rules ensuring system security and integrity. The Commission suggests detailed internal procedures that include the preparation and retention of employee affidavits and carrier records for each interception. It proposes that incumbent local exchange carriers with less than \$100M annual have the option of

individually filing the detailed procedures required by the proposed rules or of filing a certificate stating that they are in compliance with the rules. All of NTCA's members are in the less than \$100 M category. NTCA supports the proposal to give small carriers the certification option. NTCA further urges the Commission to adopt a simple certification form that carriers may use and to make the form easily accessible on its website. Carriers should be able to file the form electronically or in paper form. Internet availability and electronic filing would facilitate compliance and reduce small carriers' expense of compliance.

The Commission also asks whether it should impose identical forfeiture penalties on all entities pursuant to Sections 403 and 503(b) of the Communications Act. These penalties would apply when parties fail to produce policies, records or procedures. NTCA supports smaller penalties for the smaller entities. The smaller carriers have fewer resources to devote to compliance and a smaller revenue base than large carriers. Per day penalties will have a harsher effect on these carriers. Smaller penalties are justified as the effect of a proportional penalty will still be grave enough to ensure compliance. The Commission has direct authority under Section 503(b)(2)(D) to consider the "ability to pay" in assessing forfeitures.

Respectfully submitted,

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ASSOCIATION

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December 9, 1997

CERTIFICATE OF SERVICE

I, Rita H. Bolden, certify that a copy of the foregoing Comments of the National Telephone Cooperative Association in CC 97-213 was served on this 9th day of December 1997, by first-class, U.S. Mail, postage prepaid, to the following persons on the attached list:

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